NO. 87-143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
FILED
AUG 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

MABEL G. WELLS,

Petitioner,

VIRGINIA COMMONWEALTH UNIVERSITY

and

WAYNE C. HALL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION

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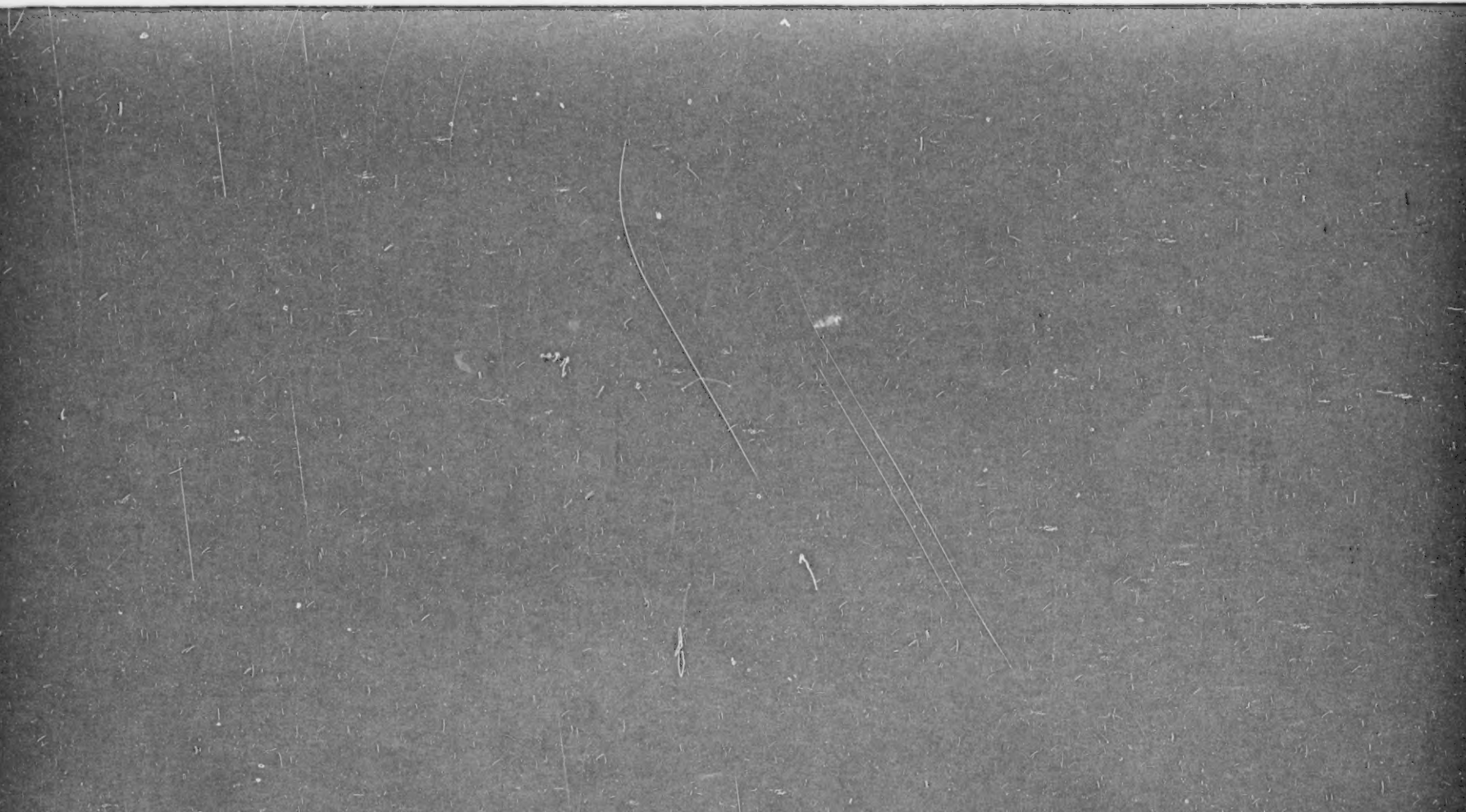

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Respondents, Virginia Commonwealth University and Wayne C. Hall, by counsel, respectfully request that this Court deny the Petition for a Writ of

Certiorari, which seeks review of the Order for the Court of Appeals of the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not reported. A copy of the opinion appears in Petitioner's Appendix at pages A-1 through A-9. The opinion of the United States District Court for the Eastern District of Virginia is also unreported; a copy appears in Petitioner's Appendix at pages A-10 through A-27.

STATEMENT OF THE CASE

Petitioner, a black female, currently is employed as a tenured associate professor in the School of Social Work at Respondent Virginia Commonwealth University ("VCU"). (App. 33). (Parenthe-

tical references are to the Joint Appendix filed in the appeal below with the United States Court of Appeals for the Fourth Circuit, Record No. 86-1561). VCU is a state university located in Richmond, Virginia.

Petitioner nominated herself for promotion to the rank of full professor in November, 1983. (App. 166). Her application was evaluated in accordance with the rules and regulations prescribed in VCU's Promotion and Tenure Policies and Procedures document ("Policy"). (App. 119). The Policy has two basic purposes: (1) to establish criteria for reviewing all applications, and (2) to establish a formal evaluation procedure.

The first step in the evaluation

procedure under the Policy is a review by a promotion and tenure committee in the school wherein the applicant seeks promotion. The committee established in the School of Social Work to evaluate Petitioner's candidacy for promotion reviewed her application and voted 5 to 2 in favor of Wells' promotion. (App. 78).

The next step in the review and evaluation process was for the dean of the school to examine the school committee's recommendation and to make a recommendation to the Vice President for Academic Affairs. (App. 119 at p.12). Dr. Grace E. Harris, the Dean of the School of Social Work, reviewed Petitioner's file and, although acknowledging Petitioner's limitations in terms of published scholarly materials, neverthe-

less recommended that Petitioner be promoted to full professor. (App. 79-80).

The next person in line to review Petitioner's application was the Vice President for Academic Affairs, Respondent Wayne C. Hall. Without personally reading all of the materials submitted by Wells in support of her application but after reviewing Petitioner's file, which included the reports and recommendations of the School Committee and the Dean of the School, Hall forwarded to the University Promotion and Tenure Committee ("University Committee") his recommendation that Petitioner not be promoted. Hall observed that Petitioner was "lacking in research and publication at the levels expected of a full professor to gain national recognition." (App. 82).

Following its review of the Petitioner's file, which included all reports and recommendations from prior reviewers, but without reading all of Petitioner's published materials, the University Committee voted unanimously against recommending Petitioner for promotion, noting her lack of scholarly activity and national reputation. (App. 83). Contrary to the statements in Petitioner's Statement of the Case, the trial record does not support her stated factual conclusion that Respondent Hall and the University Committee ignored the School of Social Work's criteria for promotion and tenure. In fact, the Chairman of the University Committee testified that the Committee followed both the University and the School documents (App. 295). He testified further

that the University Committee felt that by recommending Petitioner for promotion in the face of acknowledged weakness in Petitioner's scholarly publication record, the School Committee and the Dean had failed to follow their own School guidelines. (App. 327).

Petitioner appealed the decision of the University Committee to the University Promotion and Tenure Appeal Panel ("Appeal Panel") which, after consideration of Petitioner's appeal, voted unanimously to affirm the decision of the University Committee. (App. 122). The negative decision of the Appeal Panel was subject to no further appeals within VCU. (App. 119 at p.16).

Petitioner ultimately filed suit in the United States District Court for the Eastern District of Virginia, Rich-

mond Division, claiming that she was discriminated against in the promotion process based upon her race and sex in violation of her statutory and constitutional rights. Following a trial on the merits, the District Court, finding that Petitioner had failed to carry her burden of proving either that she had been the victim of discrimination or that she had been denied her constitutional rights, entered judgment in favor of Respondents on all counts.

On appeal to the Fourth Circuit Court of Appeals, the District Court's decision was affirmed in all respects.

ARGUMENT

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE COURTS BELOW HAVE GIVEN FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY.

Petitioner seeks to have this Court reconsider arguments and evidence which have been fully considered and, Respondents submit, correctly decided by the courts below. Petitioner sought to convince the trial court that the Respondents' failure to grant her promotion request was motivated by impermissible racial and gender animus and that the failure of certain persons in the promotion review process to read all of her supporting documents violated her constitutional rights. The Honorable Robert R. Merhige, United States District Judge, concluded that Petitioner failed to establish that she had been discriminated against on the basis of either race or sex and had failed to demonstrate that she had been deprived of her constitutional rights, finding that Respondents

had not acted arbitrarily in denying her promotion as had been alleged by Petitioner.

On appeal to the Fourth Circuit Court of Appeals, Petitioner again asserted that the failure of Respondent Hall and the University Committee to read all of her supporting documents constituted an inadequacy in the review process in alleged contravention of her rights under the due process clause and that the failure of the trial court to find evidence of discrimination on the basis of race was in error. The Court of Appeals, in a per curiam decision affirming the District Court's decision, found sufficient support in the record to uphold the trial court's dispositive findings of no discriminatory intent. With respect to Petitioner's due process

claim, the Court of Appeals similarly found that the alleged failure to review all arguably relevant materials in the promotion review process did not render the decision an arbitrary and capricious one, as had been argued by Petitioner. Petitioner now seeks to have this Court address these same issues raised below and, effectively, to re-examine the evidence offered by Petitioner in support of her claims.

Granting certiorari in this case would be most inappropriate. This Court clearly has ruled that it does not grant certiorari to review evidence or inferences drawn from it or to discuss specific facts. General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 75 (1938), reh'g denied, 305 U.S. 675 (1939); United States v. Johnston, 268

U.S. 220, 227 (1925). Being a court of law rather than a court for correction of errors in fact finding, this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949); Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967). There has been no such showing in this case. The Court of Appeals applied the correct standard for review of the factual findings of the District Court and concluded that its findings were not clearly erroneous. Anderson v. City of Bessemer City, 470 U.S. 564 (1984); Pullman-Standard v. Swint, 456 U.S. 273 (1982). The Court of Appeals similarly found that the facts alleged in support of Pe-

titioner's due process argument did not demonstrate that the decision-making process was arbitrary and capricious.

Petitioner now requests this Court to balance the evidence presented to and to scrutinize the consideration of the facts previously undertaken by the District Court and the Court of Appeals and resolved twice against the Petitioner. This Court should not accept the invitation to undertake a third review of the evidence in this case. Bohmer v. Pennsylvania R.R., 252 U.S. 496 (1920).

II THE PETITION PRESENTS A QUESTION TO THIS COURT THAT WAS NOT RAISED BELOW.

Petitioner attempts to urge upon this Court consideration of a question (Petitioner's Question II.) that was not presented to the appellate court below. Petitioner presented only two

issues to the Court of Appeals, which issues correspond to Questions I and III raised in her Petition to this Court. (See Respondent's Appendix A, Petitioner's Statement of the Issues Presented for Review to the Fourth Circuit Court of Appeals). Petitioner argued to the Court of Appeals neither that the Respondents had "ignored" her School's criteria for promotion nor that, as a result, she had been denied due process; and the record of the trial court would not have supported such arguments in any event. This Court simply must reject Petitioner's invitation to rule on an issue not raised below. Delta Airlines v. August, 450 U.S. 346, 362 (1981); Sonzinsky v. United States, 300 U.S. 506 (1937).

III. THE ISSUES ARE NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

The questions raised in the Petition turn on the particular facts of this case alone and are of interest only to the parties to this case. As suggested above, Petitioner asks this Court to make a third review of the lengthy trial record and see if it can find what the two lower courts have been unable to find: proof of racially discriminatory treatment and proof of denials of due process or other constitutional rights. Such fact canvassing is not a task to be served by a grant of certiorari. United States v. Johnston, supra. Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished

from the parties. NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951).

IV. THE COURT OF APPEALS HAS NOT RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS OR OF THIS COURT ON THE SAME MATTER.

Petitioner has cited no conflict between the decision of the Fourth Circuit Court of Appeals in this case and the decisions of other Circuit Courts of Appeals or of this Court on the same matter. In fact, and with the exception of citations to decisions of this Court which speak to the burden of proof scheme in discrimination cases, from which neither the District Court nor the Court of Appeals departed in the present case, the only case cited by Petitioner is another decision of the Fourth Circuit Court of

Appeals, Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979), which Petitioner mistakenly suggests was cited and relied upon by the Fourth Circuit in the present case. The Clark case was cited and relied upon by the District Court, but no mention of the Clark case appears in the Fourth Circuit's decision. Petitioner simply offers no legitimate basis for this Court to undertake review of her case and her invitation to review should be denied.

V. THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Petitioner's due process issues presented to this Court are premised on the assumption that she had a protected property interest in the promotion which she claims she wrongfully was denied or in the procedures by which such decisions

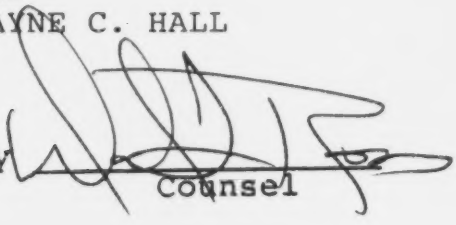
were made. However, Petitioner demonstrated below no more than a unilateral expectation that her promotion would be forthcoming. Such is insufficient to create a "property interest" so as to invoke the protections of the due process clause. Board of Regents v. Roth, 408 U.S. 564 (1972). The Court of Appeals found it unnecessary to rule on the question of whether Petitioner had a protected property interest, choosing instead to assume, for the purpose of review only, the existence of such a protectible property interest before going on to conclude that Petitioner had not been denied due process. However, absent a clear demonstration of the existence of a protected property interest, Petitioner's due process claims present no substantial federal question warranting review by this Court.

CONCLUSION

Respondents, therefore, request that the decision of the Court of Appeals be affirmed and that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

VIRGINIA COMMONWEALTH UNIVERSITY
AND
WAYNE C. HALL

By 
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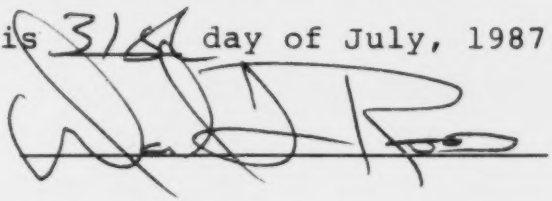
CERTIFICATE OF SERVICE

I hereby certify that two (2) true and exact copies of the foregoing Petition was mailed, postage prepaid, to Mabel G. Wells, Petitioner, pro se, 3404 Gloucester Road, Richmond, Virginia 23227, on this 31st day of July, 1987.



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APPENDIX A

PETITIONER'S STATEMENT OF THE ISSUES PRESENTED TO THE FOURTH CIRCUIT COURT OF APPEALS

I. WHETHER THE DECISION NOT TO READ THE SCHOLARLY DOCUMENTS SUPPORTING APPELLANT'S CANDIDACY FOR FULL PROFESSORSHIP BY THE VICE PRESIDENT FOR ACADEMIC AFFAIRS FOR VIRGINIA COMMONWEALTH UNIVERSITY (VCU) AND THE UNIVERSITY COMMITTEE ROSE TO A CONSTITUTIONAL DEPRIVATION VIOLATIVE OF THE DUE PROCESS CLAUSE.

II. WHETHER THE TRIAL COURT ERRED IN FINDING THAT APPELLANT WAS NOT DISCRIMINATED AGAINST BASED ON HER RACE.